



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 301 OF 2018

(Before Hon. Justice Mathews N. Nduma)

JOHN ZACHARIA MOGUCHE.....CLAIMANT

VERSUS

COUNTY EXECUTIVE COMMITTEE MEMBER

OF KISII.....1ST RESPONDENT/DEFENDANT

COUNTY GOVERNMENT OF KISII.....2ND RESPONDENT/DEFENDANT

COUNTY GOVERNMENT OF NYAMIRA.....3RD RESPONDENT/DEFENDANT

THE COUNTY GOVERNOR OF KISII.....1ST CONTEMNOR/RESPONDENT

THE COUNTY GOVERNOR OF NYAMIRA.....2ND CONTEMNOR/RESPONDENT

SKITTER WANGARI MBUGUA.....3RD CONTEMNOR/RESPONDENT

MONGERI MIRIERI.....4TH CONTEMNOR/RESPONDENT

OSBORN NANGA.....5TH CONTEMNOR/RESPONDENT

ZABLON M. ONGORI.....6TH CONTEMNOR/RESPONDENT

SAMWEL MAIKO.....7TH CONTEMNOR/RESPONDENT

JAMES GICHANA.....8TH CONTEMNOR/RESPONDENT

JACKLINE MOMANYI.....9TH CONTEMNOR/RESPONDENT

FANICE MOSE.....10TH CONTEMNOR/RESPONDENT

JOSEPH TIRIMBA ONSERIO.....1TH CONTEMNOR/RESPONDENT

JUSTUS NYABWENGI OMARI.....12TH CONTEMNOR/RESPONDENT

MOSES ONDERI.....13TH CONTEMNOR/RESPONDENT

FREDRICK N. NYAMWEYA.....14TH CONTEMNOR/RESPONDENT

JACKLINE MIRERI.....15TH CONTEMNOR/RESPONDENT

DICKSON KIRUI.....16TH CONTEMNOR/RESPONDENT

GUSII WATER & SANITATION CO. LTD.....17TH CONTEMNOR/RESPONDENT

RULING

1. Application dated 7th January 2019 brought under *Section 5(1) of the Judicature Act, Cap 8 Laws of Kenya Section 1A, 3A of the CPA; Order 51, Rule 1 and Order 40 Rule 3 of the Civil Procedure Rules Cap 21 Laws of Kenya* seeks to have the named respondents be found guilty of contempt of court and be committed to 6 months Civil jail for disobeying the court orders of 29th September 2018 in which the court restrained the respondents from sending the claimant on compulsory leave pending the hearing and determination of the application.
2. The application is supported on grounds set out in the Notice of Motion and the supporting affidavit of James Nyakundi, advocate for the claimant filed on 8th July 2019.
3. Applicant states that the Governors of Kisii County and Nyamira County were served with the court order on 2nd October 2018. That the 3rd Contemnor, being member of the Executive Committee Kisii County, in charge of Energy, Water, Environment and Natural Resources was also served on 2nd October 2018 and is the officer who had sent the claimant on compulsory leave.
4. The 4th and 5th Contemnors are Chairman and Acting Managing Director of the Gusii Water and Sanitation Company Limited, the 17th Contemnor and that the 6th to 16th Contemnors are Directors and Secretary of the Board.
5. That all the Contemnors were served with the court order on 2nd October 2018 and acknowledged receipt and appointed counsel to represent them in court but went ahead to disobey the court orders.
6. That the contemnors are in willful disobedience of the court orders and they be found guilty and sentenced accordingly.
7. Grounds of opposition on behalf of 2nd, 7th, 8th and 10th contemnors/respondents were filed in which they deny having been served with the alleged court order at all. They seek to be struck out of the application.
8. On 22nd January 2019, respondents/contemnors number 4, 5, 11, 12, 14, 15, 16 and 17 filed grounds of opposition in which they allege that they were never a party to the suit. That they are not aware of the alleged court orders.
9. That there was no cause for contempt in petition Number 6 of 2018 as alleged by the applicant or at all in that appointment of the Board of Directors followed a High Court judgment delivered at Kisii High Court petition number 5 of 2018 in which a time frame for recruitment of new directors was set. That the applicant was still the Managing Director of the 17th respondent. That he had never been forcefully removed from office nor sent on compulsory leave. That the applicant is suing himself, a situation that is untenable.
10. That the application be dismissed.
11. A notice of preliminary objection was filed on behalf of the 16th respondent that the application offends orders 1 and 5 of the Civil Procedure Rules 2010 and it be dismissed with costs. That he was never a party to the suit prior to the issuance of the orders of the court nor was he served with the said orders. That he only learnt of these proceedings on 14th January 2019 when the present application was served on his office. That as a company secretary he does not make executive decisions for the Gusii Water Company and only acts on instructions of the Board to implement their decisions and gives advice as and when called upon to do so by the board.
12. That the Board had not replaced the claimant but 13th respondent was Acting Managing Director when the claimant was on medical leave and was not replaced by the Board on 30th June 2018 before the 13th respondent was appointed on 30th October 2018.
13. It is opportune to note that no supplementary affidavit was filed by the applicant to contradict the facts set out by the respondents in the aforesaid notices of opposition to the application.
14. In particular, the applicant did not respond to the allegations that the respondents were not parties to the suit, were not served with the court order alleged to have been disobeyed and that they have never participated in a decision to send the claimant on compulsory leave as alleged or at all. That the claimant was still the substantive Managing Director as at the time the suit was filed and orders issued and that the Acting Managing Director had not replaced substantively the claimant but the appointment was for the period the claimant was on medical leave.
15. The applicant did not attach to the application any evidence that any of the alleged contemnors were personally served with the court order issued on 29th September 2018 and dated 2nd October 2018. The said order does not have a penal notice but the applicant attaches a penal notice dated 3rd October 2018 which is not part of the order of the court extracted on 2nd October 2018. There is no evidence at all that an order with penal notice was ever served on any of the respondents/contemnors.
16. It is also true that only the 1st, 2nd and 3rd respondents were parties to the suit and in the absence of any evidence that the alleged contemnors number 1 to 17 were ever personally served with the court order with a penal notice issued by the court on 29th September 2018, the court has no alternative but to find that the applicant has failed to prove to the satisfaction of the court, and on a standard slightly higher

than a balance of probabilities but not beyond reasonable doubt that the alleged contemnors are in willful disobedience of the court order issued on 29th September 2018 and dated 2nd October 2018.

17. Accordingly, the application fails in its entirety with costs in the cause.

Ruling Dated, Signed and delivered this 31st day of July, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Nyakundi for claimant/Applicant.

Mr. Musote for 1st and 2nd Respondents.

Mr. Omondi for 16th Respondent.

Mr. Aseki for 3rd, 7th, 8th and 10th Respondents.

Mr. Masese Reuben for 4th, 5th, 11th, 12th 15th and 17th Respondents

Chrispo – Court Clerk